extent that they compete in other product markets, like the enterprise services market, such competition is evolving more slowly and in more limited geographic areas.[119] Accordingly, our impairment analysis considers the markets where this competition has occurred, and reaches the appropriate unbundling conclusions based on this competition. We also note that incumbent LECs remain free to seek forbearance from the application of our unbundling rules in specific geographic markets where they believe the aims of section 251(c)(3) have been "fully implemented" and the other requirements for forbearance have been met.[120] One incumbent LEC, Qwest, has already sought such relief in one geographic market, and we encourage other incumbent LECs to file similar petitions where appropriate.[121]

40. Finally, we note that incumbent LECs remain subject to the nondiscrimination provisions of the Act, such as that found in section 202. Thus, where wireless and long distance carriers seek to use

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broadband service today is far from ubiquitous. *See* Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2004*, Tables 1-2 (Dec. 2004) (reporting that as of June 2004 there were 32,458,458 "high speed" lines with capacity of over 200 kbps in at least one direction, of which 23,473,932 are classified as "advanced services" lines with capacity in excess of 200 kbps in both directions); *see also* Verizon Comments, Attach. I, Declaration of Michael K. Hassett & Vincent J. Woodbury (Verizon Hassett/Woodbury Decl.) at para. 38 (claiming that that the broadband penetration rate is approximately 25%), MCI Reply at 17 (claiming that the broadband penetration rate is approximately 21%). In addition, customers who use DSL as their broadband platform generally must also subscribe to wireline telephone service in order to obtain, or at least to obtain widely advertised rates for, that DSL service, which suggests that for such customers VoIP is purchased as a supplement to, rather than a substitute for, traditional local exchange service. *See* Covad Reply at 8; MCI Reply at 20. Although we recognize that limited intermodal competition exists due to VoIP offerings, we do not believe that it makes sense at this time to view VoIP as a substitute for wireline telephony. *See, e.g., AWS/Cingular Merger Order*, 19 FCC Rcd, para. 238 n.557 (recognizing that SBC and BellSouth face some competition from cable operators and VoIP providers); *cf. also* MCI Reply at 12 (claiming that only 200,000 subscribers currently subscribe to VoIP services).

[119] *See, e.g.*, Letter from Thomas Jones, Counsel for Cbeyond, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Nov. 19, 2004) (Cbeyond Nov. 19, 2004 *Ex Parte* Letter) (describing ways in which competition from cable operators has been limited); *see also* Letter from Michael H. Pryor, Counsel for NuVox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Nov. 22, 2004) (NuVox Nov. 22, 2004 *Ex Parte* Letter) (same); ALTS *et al.* Reply at 33 ("If business class cable modem services really were comparable to DS1 level services, businesses would not be willing to pay 5 times as much for a DS1 as they do for a business cable modem connection.").

[120] Section 10 of the Act sets forth the relevant forbearance requirements. 47 U.S.C. § 160. Section 10(d) specifies that "[e]xcept as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been *fully implemented*." *See id.* at § 160(d) (emphasis added). Assuming that requirement is met, the Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. *See id.* at § 160(a).

[121] *See* Qwest Corporation Petition for Forbearance Pursuant to 47 U.S.C. § 160(c), WC Docket No. 04-223 (filed June 21, 2004) (requesting that the Commission forbear from applying the requirements of section 251(c) and sections 271(c)(2)(B)(i-vi) and (xiv) to Qwest's provision of telecommunications services in the Omaha, Nebraska MSA and from regulating Qwest as a dominant carrier and as the incumbent LEC in the Omaha MSA).

incumbent LEC facilities on a tariffed basis, they will be entitled to access on similar terms as other, similarly situated carriers.[122]

C. Reasonable Inferences

41. We next highlight our reliance, in this Order, on the reasonable inferences that can be drawn with regard to one market from evidence of competitive deployment in other, similar markets.[123] In its early efforts to implement the Act's unbundling requirements, the Commission relied on national unbundling rules. In *USTA I*, the D.C. Circuit criticized the Commission's decision "to adopt a uniform national rule, mandating [an] element's unbundling in every geographic market and customer class, without regard to the state of competitive impairment in any particular market."[124] In response to the court's concerns, we adopted in the *Triennial Review Order* a more nuanced approach, accounting not only for geographic market disparities but also for specific customer classes (*i.e.*, for distinctions between the mass market and the enterprise market). With regard to many of the elements most central to the provision of telecommunications service, we adopted specific triggers that tied unbundling determinations to the state of competitive deployment in particular markets, and to the potential for such deployment as evidenced by the presence of economic and operational barriers to entry. In these cases, we asked the state commissions to apply the triggers that measured actual deployment and to perform the "potential deployment" analyses.[125]

42. In addition to striking down the Commission's subdelegation of authority to state commissions, the D.C. Circuit also directed the Commission to treat competitive deployment in one market as probative of the prospects for competition in similar markets – that is, to draw inferences regarding the prospects for competitive entry in one market based on the state of competition in another market. Thus, for example, the court directed the Commission, when evaluating whether requesting carriers are impaired without unbundled access to incumbent LECs' dedicated transport facilities along a particular route, to consider evidence of deployment along similar routes.[126]

43. We adopt in this Order an approach that relies – to a far greater degree than our previous analyses – on the inferences that can be drawn from one market regarding the prospects for competitive entry in another. Specifically, as described in detail below, we rely, where possible, on correlations between business line counts and/or fiber collocations in a particular wire center,[127] on the one hand, and

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[122] 47 U.S.C. § 202.

[123] As described below in the sections applying our standard to particular elements, we generally assess "similarity" in terms of the expected revenue opportunities and/or the likely presence of competitive fiber facilities in the markets at issue. *See infra* Parts V, VI.

[124] *USTA I*, 290 F.3d at 422.

[125] *See Triennial Review Order*, 18 FCC Rcd at 17232-33, paras. 410-11; *id.* at 17299, paras. 506-07.

[126] *See infra* Part V. As the court summarized it, when the Commission analyzes impairment between points A and C, it cannot, without good reason, ignore the fact that multiple competitors supply DS1 transport between points A and B, assuming that A, B, and C are all in the same geographic market and are similarly situated with regard to entry barriers. *USTA II*, 359 F.3d at 575.

[127] *See generally infra* Parts V, VI.

the deployment of competitive dedicated transport or high-capacity loops, on the other.[128] As described below, the record shows a correlation between the number of business lines and/or fiber collocations in a wire center and a revenue opportunity sufficient to lead to facilities duplication in the geographic area served via that wire center.[129] In light of these correlations, we draw inferences, based on competitive deployment in certain markets, regarding the likelihood of competitive entry in other markets exhibiting similar characteristics. We believe it is reasonable to expect that competitive LECs can most economically deploy dedicated transport facilities and high-capacity loops in those geographic markets where revenue opportunities are highest, which is confirmed by the evidence of actual deployment found in the record. Thus, in lieu of the *Triennial Review Order*'s approach – which coupled triggers measuring actual deployment with fact-intensive, market-by-market potential deployment analyses, both of which were to be performed by state commissions – we adopt below a regime that accounts for actual and potential deployment by inferring from competitors' facilities deployment in one market the ability of a reasonably efficient competitor to enter another, similar market in an economic manner.

44. We believe that, where warranted, our exercise of discretion to use reasonable inferences instead of fact-specific proceedings conducted by this Commission to determine impairment is reasonable and best serves the public interest. First, it would be impossible for this Commission to conduct the fact-intensive, market-specific inquiries that we previously asked the states to conduct to determine carriers' impairment with regard to various elements. Our choice below to draw inferences based on factors including the number of business lines and/or competitive fiber-based collocators in a given central office is a workable standard that permits us to adopt rules that provide for a substantial degree of geographic specificity without reliance on state decision-making. Accordingly, this approach allows the Commission to execute its statutory obligation to render unbundling determinations without "loftily abstract[ing] away all specific markets"[130] while also avoiding individualized review of each discrete geographic market such as that which we previously asked the states to perform.[131]

45. Second, as indicated above, our use of inferences – which denies unbundled access in markets similar to other markets in which competitors have entered without relying on UNEs – gives effect to our requirement that impairment should be found only where a reasonably efficient requesting carrier could not enter and provide service on an economic basis.[132] Because this approach assumes that competitors could enter into markets that have economic characteristics resembling those where competitors have

[128] *See id.*

[129] *See id.*

[130] *USTA I*, 290 F.3d at 423.

[131] Although some commenters suggest a two-phase proceeding to determine impairment, we find that the delays inherent in a two-step approach would perpetuate the uncertainty about our unbundling regime, harming competitors and incumbent LECs alike by perpetuating the substantial uncertainty about what UNEs will be available, thereby, among other harms, stifling the investment and innovation of all parties involved. Furthermore, although we cast no doubt on our ability to use a waiver process or other "safety valves" to mitigate a degree of over- or under-inclusiveness that otherwise would exist in our rules, we do not believe we can order that an element be unbundled where no showing of impairment has been made in light of the known costs of unbundling, including reducing the incentives to invest in facilities and innovation and creating complex issues of managing shared facilities, simply because we plan to hold a second proceeding in which we will revisit these same issues and attempt to create a record in each market that contains more factual specificity.

[132] *See supra* paras. 24-28.

entered, the tests we adopt here discount any particular carrier's failure to enter due to its own inefficiency; rather, this approach presumes that reasonably efficient carriers in one market could enter where competitors have entered in another, similar market. Third, when reasonable inferences based on the record combined with our predictive judgment do not yield a determinate answer as to whether market entry is economic, we decline to order unbundling in recognition of the substantial costs inherent in unbundling requirements. Thus, our use of inferences satisfies the *USTA II* court's directive that we account for entry in one market when evaluating the prospects for entry in a similar market, without contravening either the court's prohibition on subdelegation or its requirement that unbundling decisions be made at a sufficient level of geographic granularity.

D. Relevance of Tariffed Alternatives

46. In response to the *USTA II* court, and arguments raised by various incumbent LECs in our record,[133] we consider the appropriate role of tariffed incumbent LEC services in our unbundling framework. Above, we have addressed the court's core concern, barring use of UNEs for the provision of service in the mobile wireless and long distance markets, where carriers have successfully used special access to compete. Here, we address the relevance of special access to the unbundling inquiry in the local exchange markets where we find UNE access to be appropriate. We find that statutory concerns, administrability concerns, and concerns about an anticompetitive price squeeze, preclude a rule that forecloses UNE access upon a finding by the Commission that carriers are potentially able to compete using special access or other tariffed alternatives. We also find that a competitor's current use of special access does not, on its own, demonstrate that that carrier is not impaired without access to UNEs.[134]

47. In the *Triennial Review Order*, we "reaffirm[ed] our prior conclusion in the *UNE Remand Order* to afford little weight to evidence that requesting carriers are using incumbent LEC tariffed services."[135] We grounded our decision on four factors: (1) the fact that an alternative rule would enable the incumbent LEC to avoid unbundling simply by offering a tariffed alternative; (2) the fact that the Act requires unbundling at cost-based rates; (3) the different risks and opportunities associated with tariffed services and UNEs; and (4) the power of the incumbent to utilize vertical price squeezes against competitors relying on the incumbent for tariffed wholesale inputs.[136] In the context of its discussion of UNE access for provision of mobile wireless services, the *USTA II* court rejected the first rationale, suggesting that "[w]here competitors have access to necessary inputs at rates that allow competition to flourish" – as it had flourished in the mobile wireless market – "it is hard to see any need" for unbundling.[137] Second, the court found the Commission's reliance on the Act's mandate of unbundling at cost-based rates circular, given that the question at hand was just which elements should be made available at those rates.[138] Regarding the third rationale, the court recognized that the different

[133] *See, e.g.*, Qwest Comments at 24-30; BellSouth Reply at 45-58; MCI Comments at 151 (urging the Commission to analyze the impact of special access on impairment as a result of *USTA II*).

[134] *See infra* Part VI.C (discussing tariffed incumbent LEC services in the context of high-capacity loops).

[135] *Triennial Review Order*, 18 FCC Rcd at 17048, para. 102, *citing UNE Remand Order*, 15 FCC Rcd 3696, 3732-34, paras. 67-70 (1999).

[136] *Triennial Review Order*, 18 FCC Rcd at 17048, para. 102.

[137] *USTA II*, 359 F.3d at 576.

[138] *See id.* at 577.

opportunities and risks associated with UNEs and tariffed alternatives might justify unbundling notwithstanding the availability of such services – though "not with respect to wireless" – but that the Commission must at least consider the specific differences before relying on those differences.[139] Finally, with regard to the risk of an incumbent-orchestrated price squeeze, the court "recognize[d] that, given the ILECs' incentive to set the tariff price as high as possible and the vagaries of determining when that price gets so high that the 'impairment' threshold has been crossed," a rule barring unbundling wherever entrants could compete using tariffed offerings "might raise real administrable issues."[140] Moreover, the court underscored that "[t]hose complications might in principle support a blanket rule treating the availability of ILEC tariffed service as irrelevant to impairment," but noted that the Commission had not "defended its decision in those terms or even tried to explicate these complications."[141] Thus, the court directed the Commission to address more fully the relevance of tariffed special access alternatives to the impairment inquiry.

48. Here, upon further consideration, we determine that in the local exchange market, the availability of a tariffed alternative should not foreclose unbundled access to a corresponding network element, even where a carrier could, in theory, use that tariffed offering to enter a market. As we explain below, our restrictions on UNE access for provision of service in the mobile wireless and long distance markets, as well as our unbundling decisions with regard to specific elements, substantially limit the prospects that special access arrangements might be converted to UNEs – and thus the scope of the present inquiry – substantially. We hold, in contrast, that in the local exchange market, a bar on UNE access wherever competitors could operate using special access would be inconsistent with the Act's text and its interpretation by various courts, would be impracticable, and would create a significant risk of abuse by incumbent LECs. It would be unreasonable to conclude that Congress created a structure to incent entry into the local exchange market, only to have that structure undermined, and possibly supplanted in its entirety, by services priced by, and largely within the control of, incumbent LECs. Finally, we find that a competitor's current use of special access in the local exchange market does not conclusively demonstrate non-impairment.

1. Limited Scope of Inquiry

49. As an initial matter, we clarify that in this section we are addressing only the use of special access in markets other than the mobile wireless services and long distance services markets, namely, the local exchange markets. The *USTA II* court suggested that special access may act as a blanket substitute for UNEs "[w]here competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish."[142] Above, we gave effect to this holding, finding that competition has evolved without access to UNEs in the mobile wireless and long distance services markets, and that whatever benefits could be achieved by requiring mandatory unbundling in these two service markets would be outweighed by the costs of requiring such unbundling. As stated above, however, the court did not suggest that the existence of tariffed special access offerings necessarily preclude unbundling for provision of service to the local exchange market.[143] Thus, in this section, we address only the impact on

[139] *Id.*

[140] *Id.* at 576.

[141] *Id.*

[142] *Id.*

[143] *See supra* para. 17.

our unbundling regime of the minority of special access circuits that are *not* used for the exclusive provision of interexchange service or mobile wireless services. Moreover, of the special access arrangements used to compete in the local exchange market, only a subclass are at issue here. Incumbent LECs offer lit services over a wide range of transmission facilities through their special access tariffs, facilities for which there often is no corresponding unbundling obligation. Even setting aside the availability of tariffed alternatives, we have previously determined there is no unbundling obligation for any OCn loops or transport, and, as described below, we do not require that incumbent LECs make their other high-capacity loops or transport available to customers in many cases. Special access used to connect incumbent LECs' networks to competitors' networks also cannot be converted into UNEs because, as we make clear below, competitors are not impaired without access to entrance facilities, or links to mobile base stations or switching centers. Further, in other orders, we have substantially limited unbundled access to fiber-to-the-home, fiber-to-the-curb, and hybrid loops used to serve the mass market. In short, the scope of our inquiry in this section is significantly circumscribed by our decisions to deny unbundled access for reasons other than the availability of tariffed incumbent LEC offerings such as special access. Thus, only where we do not otherwise limit unbundling, such as for certain end-user channel terminations, is our discussion of special access alternatives relevant.

2. Statutory Concerns

50. We first conclude that the language and structure of the Act, as well as the interpretations that the Supreme Court and courts of appeals have adopted with regard to the provisions at issue militate against a bar on UNE access wherever carriers could compete using special access. Specifically, for reasons not previously considered by the court of appeals, the approach urged by incumbent LECs would be inconsistent with the structure of the Act and the policies underlying it.

51. First, any interpretation of the Act that would bar UNE access wherever carriers could compete using an incumbent LEC's tariffed special access offering would substantially undercut the statutory framework established by Congress in sections 251 and 252. Incumbent carriers have offered tariffed "special access" products since before the Act's passage in 1996. Thus, Congress's enactment of section 251(c)(3), and the associated cost-based pricing standard in section 252(d)(1), at a time when special access services were already available to carriers in the local exchange market indicates that UNEs were intended as an *alternative* to these services, available at alternative pricing.[144] Indeed the Supreme Court has emphasized that Congress's passage of the Act represented "an explicit disavowal of the familiar public-utility model of rate regulation ... in favor of novel ratesetting designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property."[145] An approach that precluded access to UNEs wherever special access services were available, however, would have thwarted the very purpose of section 251(c)(3), because this approach would allow incumbent LECs, in all cases, to offer services on a tariffed basis at prices just low enough to permit competition, rather than subject to the alternative cost-based rates prescribed by section 251(d)(2) of the Act. Special access prices are regulated pursuant to the Communications Act's "just and

[144] *See, e.g.*, Sprint Comments at 37-38; ALTS *et al.* Comments at 10-13.

[145] *Verizon Communications v. FCC*, 535 U.S. 467, 489 (2002). The Court also noted that "a policy promoting lower lease prices for expensive facilities unlikely to be duplicated reduces barriers to entry (particularly for smaller competitors) and puts competitors that can afford these wholesale prices (but not the higher prices the incumbent LECs would like to charge) in a position to build their own versions of less expensive facilities that are sensibly duplicable." *Id.* at 503 n.20.

reasonable" standard, which predates and bears no necessary relation to this cost-based standard, relying instead on historical costs. Thus, if anything, Congress expressly sought to displace the special access regime – as it applied to the local exchange market – wherever entry depended on the use of bottleneck inputs; it did *not* intend to permit services offered pursuant to "the familiar public-utility model of rate regulation" to trump its more aggressive posture regarding competition.[146]

52. Certainly, if Congress meant to promote competition using a pricing framework representing a significant departure from the existing rate regulation regime, it could not have also intended to allow incumbent LECs to evade this regime simply by setting alternative, higher rates completely outside the standards and structure of section 251.[147] This is particularly so where a primary purpose of the Act – the promotion of facilities-based competition – would be frustrated by an interpretation that would rely to a pervasive extent upon the tariffed sale of incumbent special access services. We therefore decline to adopt the argument that UNE access is barred wherever carriers could compete in the local exchange market using tariffed incumbent LEC alternatives.

53. In addition, denying access to UNEs wherever the incumbent LEC offers an equivalent tariffed service on terms that allow for retail competition would risk a substantial shift in the federal and state oversight roles over pricing of network elements that Congress established in sections 251 and 252 of the Act. As the Supreme Court has recognized, these sections contemplate a federal-state partnership in the development of competition in the local exchange market. While intrastate special access does exist, the vast majority of special access offerings are purchased pursuant to federal tariffs, over which the states

[146] The *USTA II* decision could be read to suggest that special access services are made available pursuant to section 251(c)(4) of the Act, which requires incumbent LECs to make retail services available to competitors at state-mandated discounts reflecting avoided costs such as those associated with advertising and billing. *See USTA II*, 359 F.3d at 577. Special access services, however, provide competitors with one wholesale input, rather than with a retail service; competitors generally combine this wholesale input with other competitively provisioned services or facilities to build a complete service, which is then offered to retail customers. Thus, the Commission has explicitly excluded special access services from the ambit of section 251(c)(4). *See, e.g., Local Competition Order*, 11 FCC Rcd at 15934, para. 873 (stating that exchange access services are not subject to the resale requirements of section 251(c)(4)); *id.* at 15983, para. 980 ("IXCs must . . . purchase access services from incumbent LECs outside of the resale framework in 251(c)(4), through existing interstate access tariffs); *id.* at 15984, para. 984 (concluding that incumbent LEC interstate access services, which are provided to other carriers rather than to retail subscribers, are not subject to the resale requirements of section 251(c)(4)). Thus, our conclusions regarding the relevance of special access to the unbundling inquiry does not rely on section 251(c)(4).

[147] *See* CompTel/ASCENT Comments at 24 (arguing that "[i]f Congress believed that keeping special access prices and service quality at reasonable levels was sufficient to generate competitive entry, it would have been far easier to establish a rigorous regulatory regime for special access services rather than to create an entirely new regime of unbundled network elements"). As several commenters have pointed out, incumbent LECs traditionally have lacked significant incentive to discriminate in their provision of special access to long distance carriers due to section 271 line-of-service restrictions and section 272 separation requirements. *See* ALTS *et al.* Comments at 20-23; AT&T Comments at 95, 122. Although incumbent LECs have had greater incentives to discriminate in favor of their mobile wireless affiliates, any such incentives have been offset by a countervailing risk of retaliation by other incumbent LECs. Because the incumbent LECs' CMRS affiliates compete nationally for customers and rely in out-of-region territories on their competitors' special access offerings, discrimination in special access offerings to CMRS carriers by one incumbent LEC would invite retaliation from other incumbent LECs. *See* ALTS *et al.* Comments at 15; Loop and Transport Coalition Comments at 54; Covad Comments at 80 n.125; McLeod Reply at 29. In contrast, in the local exchange services market, incumbent LECs have a clear incentive to discriminate against their competitors.

have no jurisdiction.[148] If incumbent LECs are able to avoid unbundling obligations under section 251(c)(3) simply by providing a federally tariffed special access alternative, they would be able to eliminate the states from any role in implementing local competition under the Act, including their role in establishing the prices at which UNEs are available to competitors. This result would be antithetical to the shared framework Congress established for regulatory oversight of telecommunications services and carriers.[149]

3. Administrability

54. Apart from the statutory concerns set forth above, we also conclude that a rule foreclosing access to a UNE solely because a requesting carrier could compete using a tariffed incumbent LEC alternative would require a resource-intensive inquiry that would be antithetical to the Act's deregulatory purpose.[150] Under this approach, the Commission would need to evaluate, on a case-by-base basis, whether a particular requesting carrier seeking a particular UNE for service to a particular location could compete on an economic basis by using the incumbent LEC's tariffed service instead of an unbundled element. This analysis would require us to assess the potential revenues available to the requesting carrier and the price at which it could obtain a tariffed alternative, which vary dramatically on several distinct bases. As explained below, case-by-case analysis of these two questions, performed at the federal level, would be impracticable.[151]

55. Among the reasons an alternative approach is unworkable is that the Commission is unable to assess, on a case-specific basis, the appropriate cost facing a requesting carrier relying on a tariffed incumbent LEC offering. Incumbent LECs offer tariffed dedicated transport and end-user channel terminations pursuant to both state and federal tariffs, depending on whether the offering is jurisdictionally intra- or interstate. Moreover, particularly in areas subject to the Commission's pricing flexibility regime, incumbent LECs are entitled to offer services under individually negotiated contract tariffs subject to a wide variety of discounts tied to factors such as the length of the term, and the volume of service to which a competitive carrier is willing to commit.[152] The Commission is not equipped to evaluate this great variety of prices and terms on which competitors might obtain access to tariffed incumbent LEC offerings.

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[148] *See, e.g.*, Qwest Comments at 30 n.91 (stating that nearly all of Qwest's special access DS1 and DS3 circuits are purchased from interstate, rather than intrastate, tariffs).

[149] *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 377-86 (1999).

[150] No commenter has proposed a test to account for special access services in a way that avoids the burdens of the fact-intensive inquiries discussed in this subsection. Although it is possible to account for special access in a general manner by ignoring the factual complexities pervading special access services that we discuss above, we believe that making general inferences regarding special access would not be a meaningful measure of impairment and would be grossly over- or under-inclusive.

[151] We recognize the competition that exists in the wireless and long distance markets, notwithstanding the unavailability of UNEs and the use of special access. As a result of this competition, and consistent with the *USTA II* court decision, we were able to account for the use of tariffed alternatives and reach an unbundling determination with respect to wireless and long distance carriers without engaging in the nuanced – and unadministrable – impairment inquiry required for the local services market.

[152] *See* 47 C.F.R. § 69.727(a) (providing for Phase 1 relief); 47 C.F.R. § 61.3(o) (defining contract-based tariff); 47 C.F.R. § 61.55 (describing required composition of contract-based tariffs).

56. Further, even if we had the resources to consider the multiplicity of rates that might be available to a competitive LEC seeking to offer a given service in a given area, it is not at all clear which of those offerings would form an appropriate basis for determinations regarding the prospects for competition. For example, UNEs are available on a month-to-month basis, but competitive LECs ordering tariffed services on a monthly basis will often forfeit significant discounts available to those willing to commit to longer terms.[153] It is unclear whether, in evaluating a carrier's ability to compete, the Commission would assume a term plan of longer than one month, and if so, what hypothetical term would be appropriate. Similarly, UNE pricing does not vary depending upon the total amount that a competitive LEC spends on UNEs from a particular incumbent, but incumbent LECs generally offer incentive plans that offer greater discounts to competitive LECs willing to commit to maintaining a given quantity of tariffed offerings.[154] Comparisons between UNE rates and the rate for a tariffed alternative would thus require assumptions regarding the degree to which the competitive LEC might also secure such offerings in *other* markets, for the provision of *other* services – an inquiry that would itself be extraordinarily fact-intensive and burdensome for all involved parties.[155] Separately, even if the Commission had the resources to measure the difference between UNE rates and special access rates, the inherent imprecision in such measurements and the extent of the incumbent LECs' control of special access pricing under our pricing flexibility rules likely would breed multiple disputes between carriers as to the accuracy of such measurements – disputes that the Commission, or the courts, likely would be called on to help resolve.

57. The Commission also would need to select a methodology for separating into its constituent parts incumbent LECs' bundled tariffed offerings where only some parts of that bundle potentially could be made available as a UNE. For example, a carrier might negotiate to obtain from an incumbent LEC DS1 end-user channel terminations and OC3 transport as a packaged offering. Assuming *arguendo* that a single accounting methodology could be used to separately account for individual elements in the huge

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[153] *See, e.g.*, SBC Reply at 47-48 (claiming that, in addition to volume discounts, SBC offers discounts of more than 40% for special access purchased under a three-year or five-year term plan).

[154] *See id.*; *see also* Verizon Comments, Attach. C, Declaration of Claire Beth Nogay (Verizon Nogay Decl.) at para. 33 (stating that "[m]ost carrier customers who purchase Special Access services from Verizon take advantage of volume and/or term discounts . . . . [typically amounting to] discounts of 35 to 40 percent off the month-to-month tariffed rates"); Verizon Reply at 88.

[155] As MCI argues:

> The result of pricing flexibility is a multiplicity of rates and other highly relevant terms and conditions that vary not only from incumbent LEC to incumbent LEC, from state to state, and from special access pricing zone to special access pricing zone, but from MSA to MSA as well. Special access pricing zones and MSAs bear little relation to the retail rate zones that constituted the geographic limits of the retail rates. Just lining up the zones to make geographically appropriate comparisons would be extraordinarily challenging. . . . [S]pecial access pricing is notoriously distance sensitive, in ways that frequently bear no relation to retail pricing. . . . Special access pricing is also notoriously subject to term and volume discounts, as well as other use commitments. Here too the Commission would be called upon to make defensible assumptions about the term commitment assumed in the analysis, which would in turn require the Commission to evaluate the nature of the CLEC making use of the service being evaluated. Or, more likely, the Commission would have to analyze multiple scenarios based on different term assumptions. It is far from clear how the Commission would take into account volume commitments.

MCI Comments at 163-64; *see also* AT&T Comments at 115-23; Covad Comments at 81-83, 90; Covad Reply at 31-32; Loop and Transport Coalition Comments at 67-68.

array of possible combinations of packaged products, it is clear that analyzing each and every individual packaged offering to determine whether an element should be unbundled would be infeasible. Separately, we cannot ignore the likelihood that any determination by the Commission after such a fact-intensive inquiry would be subject to appeal. Far from rendering an administrable method of determining access to UNEs, we find that consideration of tariffed offerings would result in excessive delay and extended confusion in the industry.

58. In short, a test that precludes access to UNEs where competitors are deemed able to compete using tariffed incumbent offerings such as special access, and therefore are deemed not impaired, would require the Commission to examine all revenues the competitive LEC might hope to capture using the UNE or special access service at issue in a given market – itself a difficult task;[156] to make determinations regarding the likely volumes and prices given the presence of competition from the incumbent and perhaps from other parties; and to compare those potential revenues against every relevant state and federal tariff and every incumbent LEC retail and wholesale service offered in every market at issue for every element or service, under every available term and volume discounts. Case-by-case assessments based on these factors would be excessively complicated, requiring resources far beyond those available to this Commission, and a test based on such an analysis would therefore be utterly impracticable.[157]

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[156] Evaluating the revenues available to requesting carriers for provision of diverse services in diverse markets throughout the nation would be extraordinarily fact-intensive, requiring case-by-case establishment of the appropriate geographic and product markets, assessment of the type and volume of customers in a given location, the presence and relevance of services that are substitutes to and complements for the service the requesting carrier seeks to offer, and, ultimately, how much of a service the requesting carrier might expect to sell, and at what price. As MCI notes, this analysis would require us to assess "every retail rate in every jurisdiction for every service that makes use of high-capacity transmission or loop facilities. Those would include, *inter alia*, enterprise telephone exchange services, access services of every kind for enterprise and mass market customers, and the entire range of data services and telecommunications services used by information service providers. And most of those rates vary in multiple pricing zones in all 50 states and, as the incumbent LECs gain pricing flexibility in a variety of retail markets, may vary from customer to customer as well." MCI Comments at 163. As described above, in the application of our reasonably efficient competitor standard, we consider all the revenue opportunities that competitors can reasonably expect to gain over their facilities by providing all possible services that an entrant could reasonably expect to sell, taking into account relevant limitations. *See supra* para. 24. Because the reasonably efficient competitor standard relies on abstract norms, rather than facts about particular competitors, to determine impairment, our use of the reasonably efficient competitor standard appropriately accounts for revenue opportunities while avoiding the administrability problems we identify here.

[157] As ALTS notes:

> Even if one could theoretically posit that competitors could rely on special access to serve some customers in some geographic areas for some period of time without access to network elements, it would be administratively impossible to identify these markets and distinguish them from markets in which competitors could not rely on special access. Such an undertaking would require an examination of the margins in serving a particular customer class in a particular geographic market and comparing those margins with the input prices competitors pay for special access. It would also require an examination of the percentage of overall costs that special access represents for competitors serving different types of customers. Of course this analysis would be hugely complicated by the fact that the input prices themselves vary enormously from significant discounts granted to large purchasers of special access to much more modest discounts granted to smaller purchasers. Moreover, as mentioned, the underlying month-to-month rates to which most discounts apply are subject to unilateral change by the incumbent LECs. In addition, all negotiated discount agreements expire and are subject to renegotiation

(continued....)

4. Risk of Abuse

59. We also find that a rule barring access to UNEs based on the availability of tariffed alternatives creates unacceptable risk of significant abuse by incumbent LECs. In the absence of UNEs, incumbent LECs would, in some metropolitan statistical areas (MSAs), have the ability to set the price of their direct competitors' critical wholesale inputs (*e.g.*, tariffed end-user channel termination and dedicated transport offerings). Specifically, we believe that the freedom associated with the pricing flexibility regime would pose grave risks to competition if we were to foreclose UNE access where tariffed alternatives provide an alternate means of competitive entry.[158] An incumbent in that situation would have substantial incentive to raise prices to levels close to or equal to the associated retail rate, creating a "price squeeze"[159] and foreclosing competition based on use of the tariffed wholesale input.[160] We find

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on likely less favorable terms in the future. Given all of these variables, it is simply inconceivable that even the most talented and dedicated regulator would be able to identify the markets for which special access for some period of time is a viable means of entry.

ALTS *et al.* Comments at 33.

[158] In 1999, the Commission established a two-phase pricing flexibility regime expanding incumbent carriers' freedom to structure pricing of their tariffed special access and dedicated transport offerings. *See Access Charge Reform*, CC Docket Nos. 98-157, 96-262, 94-1, CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order*), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001). Under this regime, pricing flexibility relief depends on a demonstration that competitors have made sufficient sunk investments in facilities within an MSA as measured by the extent of competitive fiber collocation and use of competitive transport. *See id.* at 14261-65, paras. 75-80. The triggers for various specific varieties of special access differ, but generally satisfaction of the "Phase 2" triggers requires that one or more competitors have collocated and use competitive transport in a predetermined proportion of the LEC's wire centers in the MSA at issue, or in wire centers accounting for a specific portion of the LEC's special access revenues in the MSA. *See id.* at 14296-301, paras. 141-52. An incumbent LEC subject to "Phase 2" pricing flexibility may offer some services free from the Commission's price cap rules and price cap rates, and may change its rates and terms on one day's notice. *See id.* at 14301-03, paras. 153-57. A LEC enjoying "Phase 1" pricing flexibility may offer contract tariffs and volume and term discounts for the services subject to such flexibility on one day's notice, but must maintain their generally available, price-cap constrained tariffed rates. *See id.* at 14232-37, paras. 19-33; *see also* 47 C.F.R. § 69.727(b).

[159] A price squeeze exists when (1) a firm operates as a seller of both retail and wholesale offerings, (2) one or more companies relies on the firm's wholesale offerings to compete with the firm on the retail level, and (3) the difference between the retail prices for the service at issue and the firm's price for the wholesale input – if any – is too narrow to allow its retail competitors to cover their costs by providing service in the retail market. *See, e.g.*, *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 18 (1st Cir. 1990); *Cities of Anaheim, Riverside, Banning, Colton, and Azusa, California,* et al., *v. Fed. Energy Regulatory Comm'n*, 941 F.2d 1234, 1237 (D.C. Cir. 1991); *see also Sprint Communications Co. L.P. v. F.C.C.*, 274 F.3d 549, 553-57 (D.C. Cir. 2001) (requiring the FCC to consider the possibility that incumbent LECs might effect a price squeeze involving UNEs, the prices of which are regulated, in part because TELRIC rates, conceivably, are set too high) (citing *Fed. Power Comm'n v. Conway Corp.*, 426 U.S. 271 (1976)). Here, an incumbent LEC might effect a price squeeze by raising the price for the special access service (or other wholesale tariffed offering) to a level that precludes the wholesale customer from using that service to provide service in the retail telecommunications market at a price comparable to that charged by the incumbent or other market participants.

[160] *See* Sprint Comments at 36 (claiming that in "market after market," as soon as the competitive facilities Sprint has constructed "come on line," the incumbent LEC in that region has increased special access prices for those facilities that Sprint has not been able to duplicate and for which there is no competitive supply, thereby frustrating (continued....)

that, in addition to the administrability concerns discussed above, this risk renders a bar on UNEs in the presence of tariffed alternatives non-viable.[161] It would be a hideous irony if the incumbent LECs, simply by offering a service, the pricing of which falls largely within their control, could utterly avoid the structure instituted by Congress to, in the words of the Supreme Court, "give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property."[162] This development would put the unbundling determination entirely in the hands of the incumbent LEC, which could exercise its market power to rig competitors' UNE access entitlements and foreclose long-term competition.[163]

60. Some incumbent LECs argue that if the Commission's pricing flexibility rules are not sufficient to guard against abuse, the Commission should amend its pricing flexibility rules rather than permit access to UNEs despite the availability of special access.[164] We reject this suggestion. As an initial matter, the risk of abuse is only one of several reasons that we decline to provide unbundled access only where special access is not available. More fundamentally, the Commission's tariffed pricing flexibility goals and the Commission's impairment analysis required by section 251(d)(2) are related to different statutory provisions and serve different policy goals.

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the costs savings for which Sprint's investment in facilities was made); Time Warner Telecom Comments at 15-17 (arguing that it is becoming impossible to compete in the local exchange market using special access due to increasingly onerous incumbent LEC special access terms); ALTS *et al.* Comments at 17-33 (arguing that the FCC's regulatory mechanisms used to guard against price squeezes do not apply to special access offerings); Covad Comments at 86-87; AT&T Comments at 131-34 (stating that "in many cases, the Bells are offering retail prices for finished end-to-end services that are *below* what they charge competitors for access"); MCI Comments at 154-62; MCI Reply at 111-15 (refuting arguments that competitive LECs are able to compete because incumbent LECs give them substantial discounts off tariffed rates because such arguments make the "remarkable assumption that [the incumbent LEC] will continue to charge the tariffed special access rate to customers from whom it is seeking retail business, while giving CLECs a 35-40% discount to serve the same customers"); CompTel/ASCENT Nov. 23, 2004 *Ex Parte* Letter (discussing incumbent LEC special access pricing). While some incumbent LECs have argued that the special access taken at rates offered under multi-year contracts is stable, we nevertheless note that not all carriers purchase under long-term contracts, and the potential remains for a price squeeze in tariffs available to other carriers. *See* BellSouth Reply at 48-50; Letter from Bennett L. Ross, General Counsel-D.C., BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 at 6-7 (filed Dec. 7, 2004) (BellSouth Dec. 7, 2004 Special Access *Ex Parte* Letter).

[161] While sufficient as an independent reason, the risk of abuse clearly is exacerbated by the administrability problems identified in the previous subsection, which could hamper the Commission's ability to fully police special access agreements to ensure that no tariffed offering would result in impairment to competitive carriers.

[162] *Verizon Communications v. FCC*, 535 U.S. 467, 489 (2002).

[163] As an example of the type of discriminatory tariffs about which we are concerned, the Commission recently found that BellSouth's Transport Savings Plan (TSP) discriminates in favor of BellSouth's interexchange affiliate in violation of section 272. *See AT&T Corp. v. BellSouth Telecommunications, Inc.*, FCC 04-278, Memorandum Opinion and Order (rel. Dec. 9, 2004) (holding that the TSP's volume discounts violate section 272 by favoring low-volume and rapidly growing long distance companies, like BellSouth Long Distance, and disfavoring BellSouth Long Distance's larger competitors, and further holding that the 90% volume commitment requirement contained in BellSouth's TSP tariff violates section 272).

[164] *See, e.g.*, Verizon Reply at 91, 95; SBC Reply at 56.

61. In the *Pricing Flexibility Order*, the Commission granted incumbent LECs subject to price cap regulation for interstate access services increased flexibility to set special access rates as part of a market-based approach to drive interstate access charges toward the costs of providing these services.[165] A primary mechanism by which the Commission has sought to accomplish this deregulatory aim is granting carriers progressively greater freedom to set their own rates commensurate with the level of competition that has developed. By contrast, under section 251(d)(2), the Commission must analyze whether market entry is uneconomic absent UNEs. Because the "impairment" standard differs from the pricing flexibility triggers, a competitor could well be "impaired" without access to a bottleneck facility even in a jurisdiction in which the incumbent LEC has been granted pricing flexibility.[166] Thus, there exists a potential that even where the incumbent has received pricing flexibility, a competitor might be impaired with respect to a particular UNE (*e.g.*, a DS1 loop), and thus might be subject to an anticompetitive price squeeze in the absence of that UNE.[167]

62. We do not believe that the Act's general provisions designed to guard against anticompetitive behavior are sufficient to protect competitive carriers from potential abuses of special access pricing on a timely basis.[168] *First*, while the Commission has authority to suspend or reject special access tariffs prior to their going into effect, this is not an effective tool to prevent the type of anticompetitive special access pricing discussed herein because the time provided for tariff review is likely insufficient for conducting a

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[165] *See Pricing Flexibility Order*, 14 FCC Rcd 14221.

[166] *Compare, e.g., infra* Part V.C.3 (adopting impairment criteria for dedicated interoffice transport) and *infra* Part VI.C.3 (adopting impairment criteria for high-capacity loops) *with* 47 C.F.R. § 69.709(a) (Phase 1 triggers for dedicated transport), § 69.709(c) (Phase 2 triggers for dedicated transport), § 69.711(a) (Phase 1 triggers for end-user channel terminations), and § 69.711(c) (Phase 2 triggers for end-user channel terminations).

[167] Some incumbent LECs note that, in the *Pricing Flexibility Order*, the Commission found that exclusionary pricing behavior is costly and highly unlikely to succeed in areas subject to Phase 2 pricing flexibility. *See* Verizon Reply at 95; SBC Reply at 52; *see also Pricing Flexibility Order*, 14 FCC Rcd at 14263-64, paras. 79-80. The issue the Commission considered in the *Pricing Flexibility Order* was whether to allow incumbent LECs to provide certain access services to businesses, long distance carriers, and others free from price cap regulation. The Commission's conclusion that pricing flexibility should be extended to incumbent LECs if certain triggers are met was made in a context in which facilities-based competitors could partially rely on their own sunk investment and partially rely on UNEs to provide competitive offerings, which collectively significantly lessens the risk that incumbent LECs could use pricing flexibility to drive competitors from the market such as through targeted rate reductions to end-user customers. *See, e.g., id.* at 14283, para. 112 ("If, however, competitors offer switched access services either entirely over their own facilities or by combining unbundled loops with their own switching and transport, this indicates the type of irreversible investment in facilities that warrants Phase I pricing flexibility for these services."); *id.* at 14301-02, para. 155 (reasoning that Phase 2 relief is appropriate in part because special access services generally are purchased by interexchange carriers who can find competitors to supply wholesale inputs for interexchange services where available, but not discussing competitive LECs' use of special access). The Commission in the *Pricing Flexibility Order* specifically declined to link the pricing flexibility triggers to any finding that incumbent LECs no longer have market power in the provision of services at issue. *See id.* at 14300, para. 151; *see also* Time Warner Telecom Comments at 10-11.

[168] We limit our analysis here to the prospects that existing market, tariff review, or enforcement mechanisms by themselves are not sufficient to adequately reduce the risk to competition of price squeezes in violation of the Commission's rules, at least not sufficiently quickly to prevent harm to competition due to such abuse. In this proceeding, we expressly decline to address more broadly the merits of our pricing flexibility regime or the competitive characteristics of the special access market.

price squeeze analysis.[169] *Second*, although the Commission can and will take enforcement action against unlawful special access pricing within the applicable five-month statutory deadline,[170] including, where appropriate, granting injunctive relief and the award of damages to the complainant in a complaint proceeding, enforcement actions take place after a competitor has already suffered harm due to violation of the Commission's rules. We therefore are concerned that, as a response to a possible anticompetitive price squeeze in a market that already has witnessed the exit of many competitors, such relief would not be sufficient to prevent harm in the first instance to competitors relying on a wholesale input priced to effectuate a price squeeze. *Third*, and similarly, while a price squeeze would, in theory, justify the reimposition of UNE access requirements, such a renewal of the incumbent LEC's unbundling obligations would likely occur only following a proceeding before either this Commission or the relevant state commission. In the time that it likely would take to conclude such a proceeding, there is an unacceptable risk that competitors might be harmed in a way that would adversely affect competition, including possibly being forced to exit the market. *Fourth*, whereas incumbent LECs by definition face *some* facilities-based competition in MSAs subject to phase 2 pricing flexibility, these levels of competition are not necessarily sufficient to support a finding of non-impairment.[171] The pricing flexibility triggers require only the presence of a single competitive transport provider, and do not require the presence of any facilities-based provider of channel terminations, before a price cap LEC is granted pricing flexibility.[172] As noted above, the triggers sufficient to give an incumbent LEC pricing flexibility do not necessarily demonstrate that competitive deployment is sufficiently extensive that (taking into account actual competition and inferences concerning potential competition) unbundling is no longer required under section 251(c)(3) for each and every network element. *Fifth*, it also appears that the presence of facilities-based competitors relying upon UNEs may play a critical role in constraining special access pricing. For example, as discussed below in greater detail, Time Warner Telecom argues that "the availability of UNEs has constrained the incumbents' exercise of their power to increase price and degrade the quality of special access."[173]

63. In summary, a rule that foreclosed access to all UNEs wherever competitors had access to tariffed alternatives would diminish the facilities-based competition that is the most effective discipline to anticompetitive price squeezes. Such a rule would allow an unacceptable level of incumbent LEC abuse because incumbent carriers could strategically manipulate the price of their direct competitors' wholesale inputs to prevent competition in the downstream retail market. Moreover, we believe that the uncertainty and risk associated with even the possibility of such abuse would chill competitive entry, because competitive carriers might well be averse to initiating service when they know that the incumbent could – on one day's notice, without Commission approval, and with limited market-based

[169] Incumbent LECs may amend their tariffs on either 15 days or 7 days notice, depending on the type of changes proposed. *See* 47 C.F.R. § 61.58(a)(2) (providing for 15 days notice for rate increases or changes to tariff terms or conditions, and providing for 7 days notice for rate decreases).

[170] *See AT&T Corp. v. BellSouth Telecommunications, Inc.*, FCC 04-278, Memorandum Opinion and Order (rel. Dec. 9, 2004), discussed *supra* at note 163.

[171] We note that the Commission's authority to adopt deregulatory pricing flexibility rules is not limited to those instances in which it also finds that there is no impairment related to such facilities.

[172] *See* 47 C.F.R. § 69.711(c).

[173] Time Warner Telecom Comments at 18; *see also infra* para. 65.

discipline – render competition untenable by raising tariffed prices.[174] Such uncertainty is exceedingly detrimental to long-term competition, and we decline to interpret our impairment standard to require the instability that would characterize such a regime.

5. Relevance of Current Use of Special Access

64. Finally, contrary to the arguments of some parties, we do not believe that a carrier's current use of tariffed incumbent LEC offerings to serve the local exchange markets constitutes dispositive evidence that the carrier is able to compete – and thus not impaired – without access to unbundled elements.[175] As an initial matter, we note that the incumbent LECs' argument rests on the flawed assumption that any carrier using special access is competing successfully in the local exchange markets. This is not so. First, as stated above, the majority of special access arrangements are used to provide service in the mobile wireless and long distance markets.[176] These arrangements clearly are not pertinent to the state of

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[174] *See* MCI Comments at 165-67 (arguing that even if it were administrable for the Commission to factor special access offerings into its impairment analysis, incumbent LECs could on short notice change their "special access rates and promptly render the unbundling determination obsolete"); CompTel/ASCENT Comments at 23-24.

[175] *See, e.g.*, SBC Comments at 90 ("CLECs have already shown by their wide reliance on special access that they can compete profitably when they use special access as an input."); SBC Reply at 38-40; Verizon Comments at 54-62; BellSouth Reply at 46-48; Qwest Comments at 29, 65. SBC claims that AT&T has "previously admitted as much as *98%* of the approximately 40,000 [DS1 loops] it obtains from [incumbent LECs] to provide last-mile connectivity to customers – customers to whom it provides local service – are purchased as special access, not as UNEs." SBC Reply at 38 (emphasis in original) (citing AT&T presentation, Transport UNEs are a Prerequisite for the Development of Facilities-Based Local Competition at 10 (Oct. 7, 2002), *in* Letter from Joan Marsh, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, Docket Nos. 01-338, 96-98 and 98-147 (filed Oct. 8, 2002)). We disagree with this characterization of AT&T's statements. SBC bases its claim on an AT&T filing pre-dating the *Triennial Review Order* in which AT&T appears to have been making a limited claim primarily regarding EELs, which incorporate loops and which carriers may use to provide local exchange service. *See id.* (stating that of the 40,000 AT&T local customers that require DS1-level service, 65% require EELs to carry traffic to and from AT&T's collocation cages). In the *Triennial Review Order*, the Commission determined that EELs must be made available on an unbundled basis only if the requesting carrier satisfies local service eligibility criteria – a holding the D.C. Circuit affirmed. *See Triennial Review Order*, 18 FCC Rcd at 17353-61, paras. 595-611, *aff'd by USTA II*, 359 F.3d at 592-93. AT&T leases far more than 40,000 DS1 loops from incumbent LECs, and, in the filing cited by SBC, AT&T did not claim to use the vast majority of its leased DS1 loops for anything other than providing exclusively interexchange services. *See, e.g.*, BOC Dec. 13, 2004 *Ex Parte* Letter, Attachs. 1 & 2 (showing that the top three competitive LECs – of which AT&T holds the largest market share – collectively purchase over 800,000 DS1 loops from BellSouth, SBC, Verizon, and Qwest).

[176] *See, e.g.*, Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, and Andrew D. Crain, Associate General Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Dec. 8, 2004) (Qwest Dec. 8, 2004 Newman/Crain *Ex Parte* Letter) (claiming that "the vast majority of DS1 circuits that have been purchased from Qwest by wireline competitors other than the largest [interexchange carriers] have been purchased as UNEs, rather than special access circuits. Indeed, . . . more than two-thirds of the DS1 loops purchased from Qwest by these carriers have been purchased as UNEs. These carriers account for only about 20% of Qwest's existing base of DS1 special access channel terminations. In contrast, all of the DS1 loops obtained by CMRS providers and the largest interexchange carriers were purchased as special access circuits, rather than UNEs."). The incumbent LECs collectively provide approximately 73% of their DS1 special access channel terminations, and approximately 66% of their DS3 special access channel terminations, to AT&T, MCI and Sprint as a percentage of special access channel terminations provided to all wireline carriers. *See* BOC Dec. 13, 2004 *Ex Parte* Letter, Attachs. 1 & 2. Long distance carriers other than AT&T, MCI, and Sprint collectively account for a significant share of the interexchange services market. *See* Industry Analysis and Technology Division, Wireline (continued....)

the local exchange market,[177] and, in any event, we have above foreclosed UNE access for the exclusive provision of mobile wireless and long distance services. Even in the local exchange market, however, a carrier's use of tariffed incumbent LEC offerings does not conclusively demonstrate that it is doing so successfully, or could continue to do so.[178] Our record indicates that, unlike in the mobile wireless and long distance services markets, carriers generally make only limited use of special access offerings to provide service in the local exchange services market.[179] To the extent competitive LECs are utilizing special access, many carriers may be using such services rather than UNEs, not because special access is a wholesale input that enables competitive LECs to economically compete long-term, but rather because, for various reasons, use of special access has been a necessary precondition to eventual UNE-based competition.[180] For example, it appears that some carriers signed up customers only to learn that UNEs

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Competition Bureau, *Statistics of the Long Distance Telecommunications Industry*, Table 1 (May 2003) (reporting that, in 2001, long distance carriers other than AT&T, MCI and Sprint generated approximately 30% of the total interLATA toll revenues reported by carriers other than local exchange carriers).

[177] *See, e.g.*, Letter from Daniel Wheeler, General Counsel, NTS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 at 1-2 (filed Nov. 19, 2004).

[178] *See, e.g.*, Loop and Transport Coalition Comments, Declaration of Wil Tirado (XO Tirado Decl.) at paras. 43-44 (claiming that, while XO sometimes uses special access to serve local end-user customers, it primarily relies on UNEs when leasing incumbent LEC facilities, and if it were required to convert all those UNEs to special access, XO would no longer be able to compete for DS1- and DS3-based services).

[179] XO, the nation's largest facilities-based competitive LEC, reports that of the DS1 and DS3 circuits it leases for which UNEs are available under the Commission's rules, more than 75% currently are provisioned as UNEs or are subject either to a pending request that the incumbent LEC convert the circuit to a UNE or a pending request that the incumbent LEC disconnect the circuit. *See* XO Tirado Decl. at para. 44; *see also* Loop and Transport Coalition Comments, Declaration of Dan J. Wigger (ATI Wigger Decl.) at paras. 8, 52 (stating that only 5% of the DS1 circuits purchased by Advanced Telecom from incumbent LECs are special access); Loop and Transport Coalition Comments, Declaration of Warren Brasselle (Talk America Brasselle Decl.) at para. 15 ("We do not have a single T-1 on Special Access that serves our end users. Similarly, less than 10% of our DS-3 circuits have been purchased as Special Access."); Loop and Transport Coalition Reply at 44; *supra* note 176. We therefore discount the relevance of incumbent LECs' claims that a high percentage of their high-capacity loops are provided to other carriers as special access rather than UNEs. *See, e.g.*, BOC UNE Fact Report 2004 at III-39 (reporting that most – and in the case of Verizon, nearly all – DS1and DS3 loops purchased from Verizon, SBC and BellSouth by other carriers are purchased as special access rather than UNEs). Moreover, we note that the relatively low percentage of UNEs used to provide telecommunications services may support that competition has not fully developed in the local exchange service market, where carriers generally substantially rely on UNEs, as compared with the long distance service and mobile wireless service markets, where carriers substantially rely on special access. Most carriers that obtain wholesale inputs from an incumbent LEC obtain those facilities almost exclusively either as UNEs or as special access. *See* BOC Dec. 13, 2004 *Ex Parte* Letter, Attachs. 1 & 2 (revealing that the average wireline carrier that obtains DS1or DS3 loops from an incumbent LEC obtains such loops exclusively as special access or exclusively as UNEs approximately 95% of the time).

[180] This conclusion supports our decision to adopt the reasonably efficient competitor standard in markets, unlike the mobile wireless services and long distance markets, that we have not determined to be sufficiently competitive. The record does not support the broad inferences of robust local exchange competition urged by the incumbent LECs. Rather, the record is decidedly mixed on whether particular competitive LECs that have relied on special access have been able economically to enter all markets. Furthermore, given the absence of widespread competition in the local exchange market, there is insufficient record evidence to conclude that special access-based competition, to the extent it exists, is sustainable, enduring competition.

were not available pursuant to "no facilities" policies,[181] while others adopted a strategy initially relying on special access and experienced delays or other difficulties in converting special access to UNEs.[182] The record also reveals that incumbent LECs sometimes do not permit competitors to obtain new circuits as UNEs, and only permit the competitive LEC to convert facilities obtained as special access to UNEs after a "holding period" of one to several months.[183] Moreover, incumbent LECs have priced special access tariffs at rates that might be supra-competitive but nevertheless offer substantial term and volume discounts, prompting competitive LECs to rely on these offerings for longer than they would otherwise.[184] Indeed, the very uncertainty that has characterized our UNE rules since the Act's passage

[181] *See* MCI Comments at 167-68; Loop and Transport Coalition Comments at 56; Loop and Transport Coalition Reply at 45-48; *id.* at 46 (stating that from January 1, 2004 through August 9, 2004, 47% of Broadview Networks, Inc.'s UNE orders were denied due to "no facilities"); McLeod Reply at 31. In the *Triennial Review Order*, the Commission determined that incumbent LECs, in response to an order for an unbundled network element, must make routine network modifications to facilitate the provision of that element. *See Triennial Review Order*, 18 FCC Rcd 17371-78, paras. 630-41. Routine network modifications are those incumbent LECs regularly undertake for their own customers, and include such things as rearranging or splicing cable, adding a doubler or repeater, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer, but do not include trenching or placing new cables for a requesting carrier. *See id.* at 17371-75, paras. 632-37.

[182] *See, e.g.*, Letter from Brad E. Mutschelknaus, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 at 3-5 (filed Dec. 7, 2004) (XO Dec. 7, 2004 *Ex Parte* Letter); Loop and Transport Coalition Comments at 56-59 (claiming that incumbent LECs have been have been "intransigent" in permitting competitive LECs to order certain combinations as UNEs, have hampered efforts to order UNEs for commingled services, have been "dilatory" in converting facilities that initially were acquired as special access to UNEs, and have imposed excessive charges on such conversions); Sprint Reply at 19-20. The incumbent LECs have disputed claims like those raised by their competitors. *See* Letter from Bennett L. Ross, General Counsel-D.C., BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Dec. 8, 2004) (responding to allegations raised by XO).

[183] *See* Verizon Reply at 85; Loop and Transport Coalition Comments at 57-58. Mpower Communications Corp. (Mpower) alleges that the only reason it ever orders facilities from Verizon as special access rather than UNEs is that Verizon sometimes imposes large, nonrecurring charges on UNEs that are not imposed on special access. Letter from Eric J. Branfman, Counsel for Mpower, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Dec. 8, 2004) (Mpower Dec. 8, 2004 *Ex Parte* Letter). .

[184] *See, e.g.*, Loop and Transport Coalition Reply at 48-50 (claiming that although XO is entitled to convert certain DS1s from special access to EELs, it continues to use special access while it contests conversion charges that would make the EELs as costly as special access); XO Dec. 7, 2004 *Ex Parte* Letter; *see also* AT&T Comments at 100 (arguing that Verizon's special access rates for DS1 and DS3 loops are sometimes in excess of retail rates of Verizon's private line service); Time Warner Telecom Comments at 13-14 ("The incumbent LECs often offer volume and term discounts for circuits in outlying areas where there is no competition only if a customer agrees to purchase special access from the incumbent LECs in the downtown areas where [Time Warner Telecom] and other CLECs operate," thereby creating disincentives for competitive investment in facilities in areas where deployment otherwise would be efficient); CompTel/ASCENT Comments at 19 (arguing that even if a competitive carrier can justify building its own facilities in a portion of an incumbent LEC's region, the competitive LEC often cannot self-deploy facilities for its own traffic without risking loss of substantial special access volume discounts on a region-wide basis); Loop and Transport Coalition Comments at 60 (claiming that the barriers incumbent LECs have created in ordering UNEs has lead some competitive LECs to obtain critical facilities through "long term volume and term special access agreements," the termination provisions of which in practice prevent use of UNEs); Verizon Reply at 88 (claiming that tariffed rates are discounted from 5% to 40% when competitors enter into volume and term discount ranging from 1 to 7 years, depending on the geographic area, and that carriers typically purchase special access at rates that typically are discounted from 35% to 40% off the base rates). We agree with BellSouth and (continued....)

may also have incented competitive carriers to rely on more stable special access arrangements, notwithstanding the ultimate inviability of business models based on use of such arrangements, until UNE access was more secure. In short, in many cases, it appears that carriers expected to transition to UNEs – and pursued business models relying on this eventuality – but committed to long-term special access contracts in the interim.[185] In these cases, a carrier's use of a tariffed offering may not indicate that competition without UNEs is possible in the long term, but only that the necessary initial commitment to tariffed offerings on which ultimate UNE-based competition was predicated has yet to expire.

65. Second, even assuming that some competitive LECs are providing services profitably using special access, the record indicates that the availability of UNEs is itself a check on special access pricing, and that elimination of UNE availability to customers using tariffed alternatives might preclude competition using those tariffed services going forward. Specifically, without recourse to TELRIC-priced UNEs, carriers using special access could lose substantial bargaining power when negotiating special access rates.[186] Time Warner Telecom, which relies principally on special access services where it does not self-deploy, states that "UNEs have unquestionably had a constraining influence on the incumbents' exercise of their power over special access price and service quality."[187] A rule that precluded UNE access in cases where carriers currently compete using tariffed alternatives would presume a static market, in which the elimination of UNEs had no effect on special access pricing. The record, however, reveals a dynamic market, in which elimination of UNEs would significantly risk

(Continued from previous page)

others that multi-year contracts and volume discounts are not necessarily by themselves anticompetitive. *See* BellSouth Reply at 53-58 (arguing that multi-year contracts are common and legitimate in the telecommunications industry); *see also* Verizon Kahn/Tardiff Reply Decl. at para. 20; *see also AT&T Corp. v. BellSouth Telecommunications, Inc.*, FCC 04-278, Memorandum Opinion and Order, para. 22 (rel. Dec. 9, 2004) (stating that the Commission generally views tariffed volume discount plans favorably in areas where volume and cost have a fairly direct, inverse relationship). As another example of the type of issue about which carriers have complained, Integra Telecom claims that from 1996 until January 2002, Verizon's billing systems could not bill for UNEs so Verizon treated UNE purchases on its bills as special access subject to a discount to approximate UNE rates. *See* Integra Telecom Comments at 2. Some incumbent LECs argue that if competitive LECs inappropriately have been denied UNEs and forced to rely on special access, the Commission should address that issue through enforcement mechanisms rather than by ordering unbundling. *See* Letter from Andrew D. Crain, Associate General Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 at 2 (filed Nov. 17, 2004); *see also* BellSouth Dec. 7, 2004 Special Access *Ex Parte* Letter at 6. In the context of the paragraph above and the one that follows, where we are raising an evidentiary issue and are not making conclusive findings regarding the extent to which carriers have been able to rely on special access economically to enter telecommunications markets, such a suggestion is beside the point. In any event, as we explain in the text, we do not believe that our enforcement processes regarding special access pricing could or should effectively replace our unbundling regime.

[185] *See* XO Dec. 7, 2004 *Ex Parte* Letter at 1-2; Loop and Transport Coalition Comments at 57; *cf. also id.* at 51 ("The business need to ensure that [competitive LECs] do not lose a customer while waiting for Verizon to provision what section 251 requires may justify foregoing one's statutory and regulatory rights, at least temporarily.").

[186] *See, e.g.*, BellSouth Dec. 7, 2004 Special Access *Ex Parte* Letter at 8 ("Where UNEs are available based on the Commission's impairment test, carriers could choose to order UNEs to compete for customers currently served over special access arrangements. Where this competition occurs, it is very likely that the ILECs will continue offering advantageous pricing arrangements in order to avoid handicapping their special access customers relative to UNE providers."); PAETEC Comments at 9 (urging the Commission "to retain high capacity loops as UNEs as an effective check on pricing of special access").

[187] Time Warner Telecom Comments at 15.

increased special access pricing, undermining or destroying the ability to compete using tariffed alternatives.[188] The incumbent LECs' position thus would require continued review of special access pricing on a case-by-case basis – review that would necessitate investigation not only of the applicable tariffed rate but also of the relevant retail rates in the particular jurisdiction in which a particular competitor operates.[189] Moreover, this approach would call into question the availability of UNEs in any given situation at any given time, depending on the prices and terms on which tariffed alternatives were available, and the relevant retail rates, at that time. Thus, a rule barring access whenever competitors could operate using tariffed alternatives would destroy the market certainty necessary for sustainable, facilities-based competition using either UNEs *or* special access, thereby undermining the pro-competitive goals of the Act.[190] For these reasons, even in cases where carriers currently compete using special access, the rule urged by the incumbent LECs would raise insurmountable hurdles regarding administrability and would court the risk of incumbent abuse described above.

V. DEDICATED INTEROFFICE TRANSPORT

A. Summary

66. As explained below, we tailor our transport unbundling requirements narrowly to apply only where deployment of these facilities is not economic. Specifically, we adopt a test to identify three tiers of wire centers based on the number of business lines served and the presence of fiber-based collocations, which we use to assess economic conditions at wire centers. After classifying wire centers into three tiers, we then establish rules to evaluate impairment on transport routes connecting wire centers, according to tier, enabling us to assess impairment for DS1, DS3, and dark fiber transport. Based on the evidence in the record, we make the following determinations:

- *DS1 Transport.* We find that competing carriers are impaired without access to DS1 transport on all routes for which at least one end-point of the route is a wire center containing fewer than 38,000 business lines and fewer than four fiber-based collocators. Thus, competing carriers are not impaired without access to DS1 transport on routes connecting a pair of wire centers, each of which contains at least four fiber-based collocators *or* 38,000 or more business lines.

- *DS3 Transport.* We find that competing carriers are impaired without access to DS3 transport on all routes for which at least one end-point of the route is a wire center containing fewer than 24,000 business lines and fewer than three fiber-based collocators. Thus, competing carriers are not impaired without access to DS3 transport on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators *or* at least 24,000 business lines.

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[188] *See* AT&T Comments at 122-23 (claiming that the availability of UNEs has constrained incumbent LECs' ability to raise special access prices and citing recent significant increases in special access prices following the *USTA II* decision vacating the Commission's UNE rules); ALTS *et al.* Comments at 17, 29; MCI Reply at 111; Loop and Transport Coalition Comments at 51-52; XO Tirado Decl. at para. 50.

[189] As we explained above, we do not analyze impairment on a competitor-specific basis. *See, e.g.*, Part IV.A.

[190] *See* CompTel/ASCENT Comments at 23-24 (arguing that competitive carriers will not enter the market initially, nor be able to attract sufficient capital, if incumbent LECs are able to raise the price of essential inputs on short notice, or if impairment with respect to particular network elements fluctuates with special access pricing changes).

- *Dark Fiber Transport.* Like DS3 transport, we find that competing carriers are impaired without access to dark fiber transport on all routes for which at least one end-point of the route is a wire center containing fewer than 24,000 business lines and fewer than three fiber-based collocators. Thus, competing carriers are not impaired without access to dark fiber transport on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators *or* at least 24,000 business lines.

- *Entrance Facilities.* We find that competing carriers are not impaired without access to entrance facilities.

B. Background

67. Dedicated interoffice transmission facilities (dedicated transport or transport) are facilities dedicated to a particular competitive carrier that the carrier uses for transmission between or among incumbent LEC central offices and tandem offices, and to connect its local network to the incumbent LEC's network. The definition of dedicated transport adopted by the Commission in the *Triennial Review Order* was largely similar to that adopted in the Commission's prior orders. However, in the *Triennial Review Order*, the Commission narrowed the definition by limiting transport to transmission facilities between incumbent LEC wire centers or switches and by removing from the definition transmission between incumbent LEC wire centers or switches and those owned by requesting telecommunications carriers.[191] Although the *Triennial Review Order* required substantial transport unbundling nationwide, the Commission's unbundling analysis established mechanisms for state commissions to remove the unbundling obligation on a particular route if certain indicia of alternative transport deployment were evident.[192]

68. The D.C. Circuit in *USTA II* remanded the transport analysis the Commission conducted in the *Triennial Review Order* because, due to the improper delegation to state commissions vacated by the court, the Commission's findings of nationwide impairment for DS1, DS3, and dark fiber were inconsistent with the Commission's "frank[] acknowledg[ment] that competitive alternatives are available 'in some locations.'"[193] Moreover, the *USTA II* court faulted the Commission for not adequately considering where competitors could potentially deploy their own transport facilities.[194] In the *Interim Order and NPRM*, the Commission sought comment on how to analyze impairment for transport in light of the D.C. Circuit's admonitions. Importantly, the Commission sought comment on whether it should refine its unbundling analysis for transport by applying a more nuanced analysis based on service, geographic, or capacity distinctions.[195]

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[191] *Triennial Review Order*, 18 FCC Rcd at 17202-06, paras. 365-69.

[192] *Id.* at 17213-36, paras. 381-416.

[193] *USTA II*, 359 F.3d at 574.

[194] *Id.* at 574-75.

[195] *Interim Order and NPRM*, 19 FCC Rcd at 16788-90, paras. 8-11.

C. Impairment Analysis – Interoffice Transport

1. General Operational and Economic Characteristics of Transport

69. *Operational Characteristics*. Competing carriers generally use unbundled interoffice transport as a means to aggregate end-user traffic.[196] They do so by using dedicated transport to carry traffic from their end users' loops, which generally terminate at incumbent LEC wire centers, to a point of aggregation, permitting service to customers served via multiple incumbent LEC offices without requiring the competitor to deploy or otherwise obtain its own transport facilities to those offices. Sometimes competing carriers aggregate traffic on a local fiber-optic transport ring that carries traffic to and from the competitor's switch or other equipment.[197] Often, several points on such a ring are collocation arrangements in incumbent LEC wire centers where the competitor may obtain unbundled loops to reach end-user customers, while other points may include typical traffic aggregation points such as interexchange carrier points of presence (POPs) or carrier collocation hotels.[198] In other cases, a competitive LEC might, from a single incumbent LEC office (often the location of the incumbent LEC's access tandem switch), aggregate traffic from multiple incumbent LEC offices, obtaining both unbundled loops and interoffice dedicated transport to enable this aggregation.

70. A significant proportion of competitive transport facilities are located in dense business districts. Although these areas represent a very small number of incumbent LEC wire centers, they comprise an enormous proportion of the telecommunications revenues available. Indeed, Verizon claims that demand for high-capacity special access circuits is "most heavily concentrated" in its top 20 MSAs and that concentration represents "fewer than 8 percent of [Verizon's] wire centers.[199] SBC agrees that demand for high-capacity circuits is most concentrated, and thus, so is competitive facilities deployment, in major metropolitan areas.[200] Many competitive LECs, too, agree that competitive transport deployment is apparent "only on the very densest traffic routes."[201] Similarly, the state record evidence that was compiled during state proceedings intended to implement our *Triennial Review Order*, albeit focused on

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[196] *See Triennial Review Order*, 18 FCC Rcd at 17206-07, para. 370.

[197] A fiber ring generally passes through several incumbent LEC wire centers, as well as other points of traffic aggregation, but does not duplicate the hub and spoke architecture of the incumbent LEC's network. *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17012-13, 17206-07, paras. 45, 370; BOC UNE Fact Report 2004 at III-6, III-8 through III-9 & Table 6; Loop and Transport Coalition Comments, Declaration of Mike Duke (KMC Duke Decl.) at para. 7; XO Tirado Decl. at paras. 10-14; ATX, Blackfoot, *et al.* Comments, Attach. A, Declaration of Mark A. Jenn (TDS Metrocom Jenn Decl.) at para. 6; Integra Comments at 25-26.

[198] *See* MCI Comments at 144; BOC UNE Fact Report 2004 at III-8 through III-9; KMC Duke Decl. at paras. 7, 13; XO Tirado Decl. at paras. 10-14.; Verizon Reply at 47; Verizon Reply, Attach. D, Reply Declaration of Robert F. Pilgrim (Verizon Pilgrim Reply Decl.) at paras. 4-5.

[199] Verizon Comments at 36; *see also* BOC UNE Fact Report 2004 at III-8, Table 5. While we discount the absolute parallel that Verizon attempts to draw between special access services and high-capacity unbundled elements, we nevertheless find it very persuasive that demand for similar services is so highly concentrated.

[200] *See* Letter from Christopher M. Heimann, General Attorney, SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, 96-96, 98-147 at 2 (filed Aug. 18, 2004) (SBC Aug. 18, 2004 *Ex Parte* Letter); *see also* BOC UNE Fact Report 2004 at III-8 & Table 5.

[201] Loop and Transport Coalition Comments at 82.

the particular review set forth in that *Order*, show that the existence of multiple competitive transport networks is limited to dense urban centers.[202] Further, the BOCs all have submitted maps indicating where competitive facilities are believed to exist – indicating that competitive fiber facilities are located primarily in locations with dense business traffic demands.[203] Finally, as discussed in greater detail below, the wire center data provided by the BOCs confirms that a very significant proportion of business lines are served by a relatively small number of wire centers.[204]

71. *Economic Characteristics*. The economics of transport deployment are determined by traffic volume, distance, and location.[205] While the cost of deployment increases with the length of a transport segment, as described below, the revenues generated increase with the amount of traffic that is carried on a particular transport route. Thus, when deciding whether and where to build their own facilities, competitive LECs look first at the shortest routes that have the greatest potential for traffic aggregation.[206] Furthermore, the revenues generated by dedicated transport do not depend on maintaining a single customer, or even several customers, but rather on maintaining a certain level of traffic on a route. Compared to loops, which serve individual customers, dedicated transport carries much more traffic and has much greater potential for added future traffic, as competitive LECs continue

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[202] *See, e.g.*, SBC Comments, Attach. A (summaries of state proceedings implementing the *Triennial Review Order*); *see generally* Gary Ball *et al.*, QSI Consulting, Inc., Analysis of State Specific Loops and Transport Data: Impairment Analysis (QSI Study) *in* Letter from Thomas Cohen, Counsel for AT&T, Blackfoot Telecommunications Group, *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 5, 2004).

[203] Qwest Comments, Attach. 4; SBC Comments, Attach. C; Verizon Comments, Tab H; Letter from Glenn T. Reynolds, Vice President-Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket Nos. 01-338, 96-98, 98-147 (filed Oct. 1, 2004) (BellSouth Oct. 1, 2004 Reynolds *Ex Parte* Letter); Letter from Dee May, Vice President-Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed June 24, 2004) (Verizon June 24, 2004 *Ex Parte* Letter); Letter from Cronan O'Connell, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Aug. 20, 2004).

[204] Letter from Cronan O'Connell, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Dec. 7, 2004) (Qwest Dec. 7, 2004 Wire Center Data *Ex Parte* Letter); Letter from Edwin J. Shimizu, Director-Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Dec. 7, 2004) (Verizon Dec. 7, 2004 Wire Center Data *Ex Parte* Letter); Letter from Bennett L. Ross, General Counsel-D.C., BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Dec. 7, 2004) (BellSouth Dec. 7, 2004 Wire Center Data *Ex Parte* Letter); Letter from Brian J. Benison, Associate Director-Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Dec. 7, 2004) (SBC Dec. 7, 2004 Wire Center Data *Ex Parte* Letter); Letter from Glenn T. Reynolds, Vice President-Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Dec. 10, 2004) (BellSouth Dec. 10, 2004 Reynolds *Ex Parte* Letter) (correcting the fiber-based collocation count for two wire centers); Letter from Brian J. Benison, Associate Director-Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Dec. 10, 2004) (SBC Dec. 10, 2004 Benison *Ex Parte* Letter) (supplying data for SBC operations in Connecticut).

[205] AT&T Comments at 47.

[206] *Id.* at 47-48, 52. For this reason, competitive LECs tend to self-deploy entrance facilities more frequently than transport routes between incumbent LEC offices. *Id.* at 52. For the same reason, entrance facilities also offer a greater opportunity to recover sunk costs than transport between incumbent LEC offices. *Id.* at 43.

to aggregate traffic on a route. For these reasons, competitive LECs can take advantage of economies of scale, and can also make decisions about whether to self-deploy transport based not only on actual traffic, but on potential traffic as well.

72. The deployment of transport facilities involves substantial fixed and sunk costs. Once a carrier deploys fiber on a route, that fiber cannot be moved to another location.[207] At the same time, transport facilities are not dedicated to a single customer, as described above, but rather carry numerous customers' traffic. A competitive LEC therefore does not lose the sunk costs it has incurred to deploy transport when it loses a single customer, as it may in the case of a loop, if it does not acquire a new customer requesting similar services in the same location. With transport facilities, competitive LECs have some flexibility to replace a decrease in traffic. Thus, while there are significant sunk costs associated with transport deployment, there are greater opportunities for recovering sunk costs with transport than with loop facilities.[208]

73. The costs associated with competitive deployment of dedicated transport vary widely among geographic areas – costs are generally very high per unit of distance in urban areas, especially for underground fiber, but are significantly lower per unit of distance for aerial or buried cable in low-density areas.[209] Rural areas, however, are characterized by long distances and lower demand concentration (*i.e.*, lower potential revenues), making duplication of the incumbent LEC's network less likely.[210]

74. *Specific Deployment Costs*. Numerous carriers have submitted a broad and sometimes conflicting set of cost data, which demonstrate the high variability of the cost of deployment.[211] These costs, which can vary significantly from one route to another and from one carrier to the next, are too numerous and too variable to allow us to make any national conclusions, much less to construct any cost models to assess impairment. Specifically, our approach focuses on actual competitive deployment, which signifies that actual and potential revenues justified the underlying costs. Thus, our impairment

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[207] ALTS *et al.* Comments, App. A, Declaration of Rainer Gawlick (Lightship Gawlick Decl.) at para. 4 ("Transport costs are sunk costs since the facility cannot be moved to another location should we decide to exit a market or reconfigure our network.")

[208] Competitive LECs claim that even in the same location, the salvage potential for deployed fiber is limited when a deploying competitor abandons a particular route. *See* AT&T Comments at 43 (stating that competitive LEC fiber deployed between incumbent LEC offices has no re-use value to other competitors, so sunk costs are lost if the competitive LEC abandons that particular route). *But see* Qwest Reply at 24-25 (suggesting a greater salvage potential for transport facilities deployed by competitive LECs).

[209] Qwest Reply at 11, 35; AT&T Comments, Declaration of John D'Apolito and Milford Stanley (AT&T D'Apolito/Stanley Decl.) at para. 16. Furthermore, entry barriers can differ from city to city, within the same city, or between a city and its suburbs because of differences in municipal right-of-way and permitting policies, as well as conduit availability. ALTS *et al.* Comments at 65; John W. Mayo, *et al.*, Economic Impairment Analysis at 40 (Oct. 4, 2004) (Mayo/MiCRA/Bates White Study), *in* Letter from Thomas Cohen, Counsel for AT&T, Blackfoot Telecommunications Group, *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 5, 2004).

[210] Alpheus Reply, Joint Reply Declaration of Eleuterio (Teo) Galvan Jr. and Francisco Maella (Alpheus Galvan/Maella Reply Decl.) at paras. 32-33.

[211] *See infra* paras. 75-77.

analysis of transport considers deployment costs implicitly. Nevertheless, we describe below several of the primary cost variables that parties have described in the record.

75. The costs associated with deployment of dedicated transport include the costs of collocation, the costs of equipment and materials (both the fiber itself and the electronics required to "light" the fiber), and the costs of physical deployment of the fiber.[212] Carriers deploying fiber must also obtain rights-of-way from municipalities, which can create additional costs and delays.[213] As we noted in the *Triennial Review Order*, competitive LECs are sometimes able to avoid the costs of collocation when deploying their own transport facilities if wholesale transport providers are able to perform the function of loop aggregation.[214] The record indicates that where it is necessary, collocation costs associated with the self-deployment of dedicated transport can be as much as $350,000 to $450,000 where a competitive LEC already has a switch deployed in a market, and potentially even higher when a competitive LEC is establishing a presence in an entirely new market.[215] Even where a competitive LEC already has established a collocation site in an incumbent LEC central office, it often must augment its collocation site – as well as its own POP – to accommodate increased power and space requirements.[216]

76. With respect to the physical deployment of fiber, commenters seem to agree that the construction of outside plant represents the most significant cost involved in the deployment of dedicated transport facilities.[217] This component of transport construction is distance sensitive, and competitive LECs have indicated in their comments that fiber construction costs range from $110,000 to $700,000 per mile.[218] Incumbent LECs respond that these figures assume use of the most expensive option (building new conduit, rather than leasing existing conduit) in the most expensive, urban areas, and are therefore misleadingly high.[219] Competitive LECs concede that their cost estimates include the creation of separate

[212] *Triennial Review Order*, 18 FCC Rcd at 17207-08, para. 371.

[213] *Id.* at 17206-07, para. 370; Loop-Transport CLEC Coalition Comments at 80 (indicating that it usually takes six to nine months to obtain a right-of-way).

[214] *Triennial Review Order*, 18 FCC Rcd at 17210, para. 374.

[215] ALTS *et al.* Comments at 94, 96-97; TDS Metrocom Jenn Decl. at para. 9.

[216] AT&T Comments at 49; Mayo/MiCRA/Bates White Study at 48.

[217] *See, e.g.*, AT&T Comments at 34; SBC Reply at 37.

[218] AT&T Comments at 35 & AT&T D'Apolito/Stanely Decl. at para. 16 n.9 (suggesting that AT&T's deployment costs are comparable to the HAI figure of $125,000); Loop and Transport Coalition Comments at 79-80 (describing fiber deployment costs of $110,880-$211,200 per mile for Xspedius and $400,000 to $700,000 for XO); Mayo/MiCRA/Bates White Study at 40 (suggesting that trenching for new conduit costs between $17 and $30 per foot in suburban areas and between $70 and $100 per foot in urban areas).

[219] Qwest Reply at 11, 28-29, 36-37; SBC Reply at 37; Verizon Dec. 7, 2004 Deployment Costs *Ex Parte* Letter. *But see* Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338, Attach. (filed Nov. 12, 2004) (asserting that AT&T's business case model is reasonable and does not over-estimate deployment costs).